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No. 88-2094

In the Supreme Court of the United States

OCTOBER TERM, 1989

HERSCHEL L. FAGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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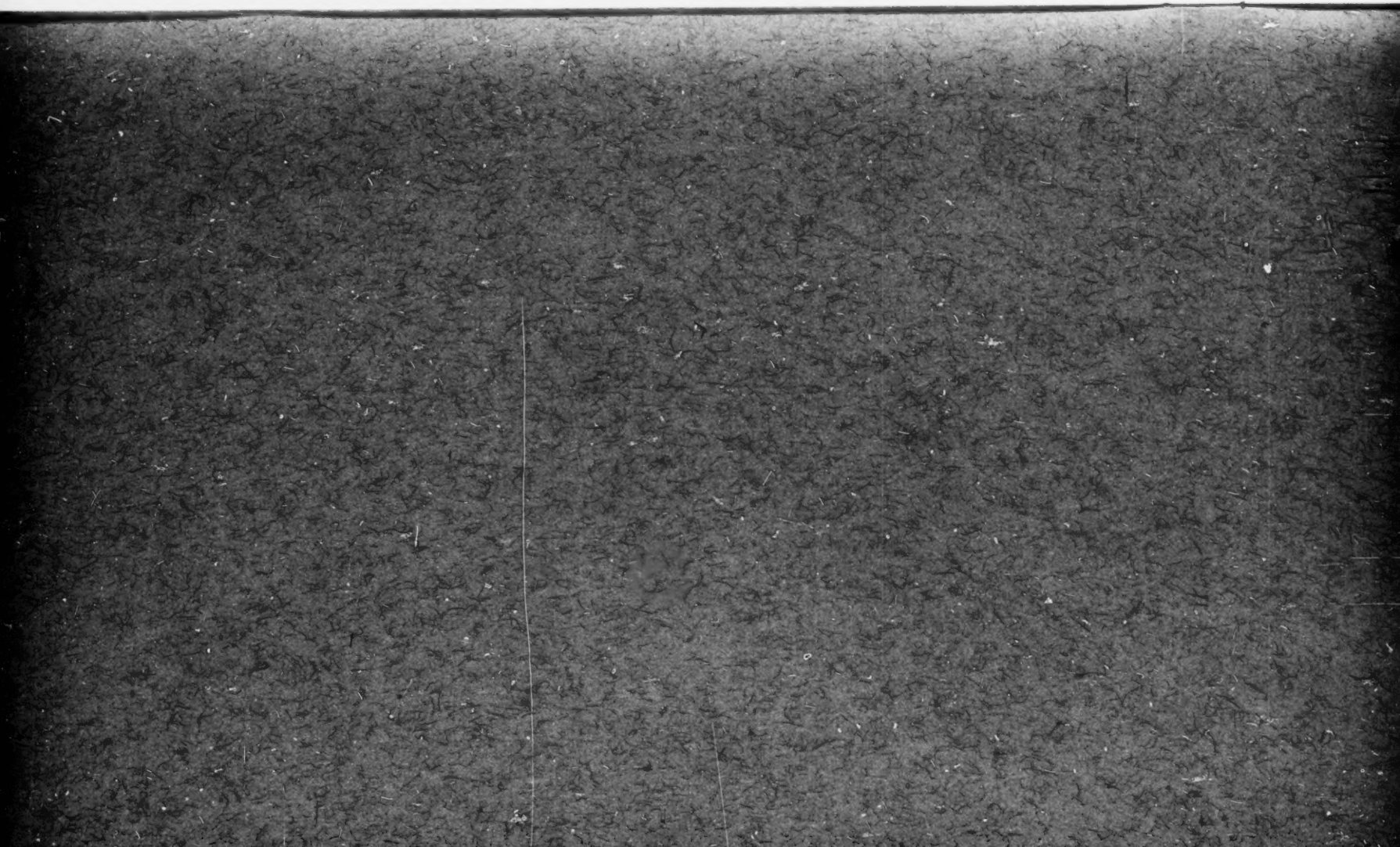

QUESTION PRESENTED

Whether the Fourth Amendment is violated when a service member is ordered by a superior to report to military law enforcement authorities for fingerprinting.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-13a) is reported at 28 M.J. 64. The opinion of the Navy-Marine Corps Court of Military Review (Pet. App. 14a-28a) is reported at 24 M.J. 865.

JURISDICTION

The Court of Military Appeals entered its judgment on April 28, 1989. The petition for a writ of certiorari was filed on June 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1987).

STATEMENT

Following a general court-martial, petitioner, a member of the United States Marine Corps, was convicted on two

specifications of larceny, on one specification of burglary, and on one specification of housebreaking, in violation of Articles 121, 129, and 130 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 921, 929, and 930. Petitioner was sentenced to confinement for five years, a bad-conduct discharge, forfeiture of all pay and allowances, and a reduction in rank to pay grade E-1. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review affirmed the findings and sentence. The Court of Military Appeals granted discretionary review and affirmed.

1. Early in 1985, a rash of burglaries occurred in petitioner's battalion. Tr. 21. An investigation revealed latent fingerprints in two of the rooms that had been burglarized. Tr. 8-9.[1] Despite a heightened state of awareness, no one reported seeing any outsider in the area of the burglaries. Tr. 9. This led Naval Investigative Service (NIS) Special Agent Michael Shevock to believe that the crimes were committed by a member of the battalion who had remained behind when the battalion left for training maneuvers. *Ibid.* Agent Shevock therefore decided to fingerprint the approximately 100 Marines who had remained behind. *Ibid.* After receiving permission from the battalion's commanding officer, and with the help of Lieutenant Haddock, an officer detailed for his assistance by the commanding officer, Agent Shevock began the fingerprinting process. *Ibid.* Under the procedure, Agent Shevock would ask Lieutenant Haddock for a given number of men, usually 15-20, without specifying their names. *Ibid.* Lieutenant Haddock would then select individuals in such a way as to cause the least amount of inconvenience to the battalion. Tr. 9-10.

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[1] The burglaries of those two rooms formed the basis of the charges against petitioner.

By March 29, 1985, petitioner was the only Marine who still had not been fingerprinted. Tr. 9. When informed of that fact, Gunnery Sergeant Vasquez told petitioner to report to the NIS office for fingerprinting. DX A. When petitioner appeared reluctant to comply, Sergeant Vasquez ordered petitioner to report to the NIS. *Ibid.* Petitioner then went to the NIS office. Tr. 27.

When Agent Shevock attempted to take petitioner's fingerprints, the agent discovered that the pads of petitioner's ten fingers had been severely scraped. Tr. 10. The skin was swollen and torn and would not leave a readable impression on the card. Agent Shevock did notice, however, that the print of one finger featured a conspicuous "double loop pattern" that "bore a striking and conspicuous resemblance" to a latent print he had lifted from one of the rooms. Based on that evidence, Agent Shevock suspected that petitioner had committed the crime. He read petitioner his rights and then interrogated petitioner about the burglaries. Petitioner denied any knowledge of the incidents. Petitioner also willingly agreed to have his hands photographed. *Ibid.* Petitioner was not placed under arrest at that time, and Agent Shevock assured petitioner that he was free to go whenever he liked. Tr. 15.

Four months later, on August 2, 1985, Agent Shevock went to Tripler Army Medical Center, where petitioner was a patient, in order again to attempt to fingerprint petitioner. Tr. 11, 17. Petitioner refused to be fingerprinted, however, even after Agent Shevock had a petty officer from the Navy liaison office order petitioner to allow his fingerprints to be taken. Agent Shevock then abandoned the attempt. Tr. 11. He decided to return when petitioner was released from the hospital and to arrest him, if necessary, in order to obtain his fingerprints. On August 6, Agent Shevock went back to the hospital. Tr. 11, 17.

When he arrived, however, he learned that petitioner was at the NIS office waiting to be fingerprinted. Tr. 12. The NIS matched petitioner's fingerprints to two prints taken from the scene of the crime. Petitioner later made an inculpatory statement regarding the crimes, on October 1, 1985. *Ibid.*

2. At trial, petitioner sought to suppress the fingerprints taken on March 29 and August 6, 1985, the photographs taken of his hands, and the statements he made to the NIS on March 29 and October 1, 1985. AX 1. The trial judge, relying on *Hayes* v. *Florida*, 470 U.S. 811 (1985), originally suppressed the fingerprint evidence, Tr. 43, but later reconsidered his decision and denied petitioner's motion. AX 7. The judge reasoned that petitioner had no privacy interest in his fingerprints, because they were on file with the military. *Ibid.*[2] The judge also found that there was probable cause to arrest petitioner once Agent Shevock noticed the similarity between petitioner's fingerprints and one of the latent fingerprints. *Ibid.*

ARGUMENT

Petitioner contends that the trial court erred by allowing his fingerprints to be admitted in evidence at trial. Petitioner argues that his fingerprints were obtained as a result of an unlawful seizure, because Gunnery Sergeant Vasquez ordered him to report to NIS headquarters without probable cause to believe that he had committed the burglaries.

Petitioner does not claim that he could not be fingerprinted in the absence of probable cause, and no such

[2] At trial, the government introduced evidence that under United States Military Entrance Processing Command Reg. 350-1 (1980), all applicants to the armed forces must be fingerprinted, and that the fingerprints are kept on file with the Federal Bureau of Investigation. Tr. 57-58.

claim could properly be asserted. Fingerprinting is not nearly as intrusive as actual invasions into the body, such as the extraction of blood, see *Schmerber* v. *California,* 384 U.S. 757 (1966), or body cavity searches, see *Bell* v. *Wolfish,* 441 U.S. 520 (1979). Nor is it as intrusive as having one's fingernails scraped for evidence, see *Cupp* v. *Murphy,* 412 U.S. 291 (1973), being compelled to provide a urine sample, see *Skinner* v. *Railway Labor Executives' Ass'n,* 109 S. Ct. 1402 (1989), or being stopped and frisked by a police officer on a public street, see *Terry* v. *Ohio,* 392 U.S. 1 (1968). Rather, the intrusion occasioned by being fingerprinted is minimal, *Davis* v. *Mississippi,* 394 U.S. 721, 727 (1969), and is not materially different from the compelled production of voice and handwriting samples, see *United States* v. *Dionisio,* 410 U.S. 1 (1973); *United States* v. *Mara,* 410 U.S. 19 (1973), neither of which entails significant inroads upon privacy. Indeed, military regulations require that all applicants for the armed forces must be fingerprinted before they enter the military, both to ensure that the applicant does not have a criminal record and for identification purposes. Tr. 57-58. See also Marine Corps Order No. P1100.75(b), at 2-1 para. 2-1(e) (Apr. 15, 1986). Petitioner therefore had no reason to believe that the Marine Corps could not take his fingerprints at any time.

Moreover, the military is a separate and distinct society, *Parker* v. *Levy,* 417 U.S. 733, 743 (1974), and servicemembers commonly experience restrictions on their freedom of movement that are foreign to ordinary citizens. Unlike civilian society, where citizens are generally entitled to go on their way without interference, military society necessarily limits the freedom of movement of servicemembers in the interests of discipline and readiness. Thus, while it would be constitutionally unacceptable in

the civilian community for the police to direct the daily movements of private citizens, the movements of military personnel are almost completely controlled by their superiors, and criminal sanctions may be imposed on servicemembers who fail to obey a lawful order. See Arts. 85, 86, 87, and 90-92, UCMJ, 10 U.S.C. 885, 886, 887, and 890-892. See generally Pet. App. 11a-12a. And as part of their military obligations, servicemembers may be called upon to assist in the investigation of a crime. See *United States* v. *Schneider*, 14 M.J. 189, 192 (C.M.A. 1982).[3]

Those principles dispose of this case. Petitioner could have been fingerprinted at any time, in his barracks or elsewhere. Petitioner also could have been ordered to go to another part of the base. And petitioner could have been ordered to assist the NIS in its investigation. Thus, the order to petitioner to report to the NIS office for finger-

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[3] As the Court of Military Appeals explained in *Schneider*, 14 M.J. at 192-193 (citations and footnote omitted):

> The obligations of the military member occasioned by his military status and by the relationships inherent in a military organization are different from those of the civilian to the police. There are numerous situations in the military context where a military person is required to provide information to military authorities without consideration of the existence of probable cause to detain. This may occur on the street, in offices, and in hearing rooms, as well as in places specifically provided for interrogation. And the obligation to report to such places for the purpose of giving information, if properly related to the military mission, is a valid military duty. It is the recognition of this peculiar military obligation that compelled the Congress to provide safeguards against self-incrimination, not to suspend the necessary flow of information but to protect the unwary subordinate against the subtle coercion of the military rank structure. Thus, in the military milieu, the focus has been on the protections accorded by Article 31, the Fifth Amendment equivalent, rather than on the nature of the infringement of the person's freedom of movement (Fourth Amendment).

printing imposed no additional (and certainly no unlawful) burden on him that could not have been imposed in the absence of any suspicion that he was involved in the burglaries at all. It is therefore immaterial that petitioner was ordered to report to the NIS office for fingerprinting, instead of being fingerprinted in his barracks. In either case, the sergeant's actions did not interfere with petitioner's privacy interests or his freedom of movement in a manner that is not otherwise permissible for members of the armed forces.

For that reason, petitioner errs in relying on *Davis* v. *Mississippi, supra,* and *Hayes* v. *Florida, supra.* In those cases, this Court held that, absent probable cause, a person cannot be brought to a police station for fingerprinting in a manner that amounts to a traditional arrest. By contrast, as the Court of Military Appeals explained, "the nondisruptive, nonhumiliating, and nonintrusive manner in which [petitioner's] prints were initially sought separates this command action from those seizures described in *Davis* and *Hayes.*" Pet. App. 12a. Equally important, those cases involved civilians, who are not subject to the same restraints on their freedom of movement as servicemembers. Because a servicemember may lawfully be subjected to restraints on his liberty that cannot be imposed on civilians, those cases provide no support for petitioner's Fourth Amendment claim.[4]

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[4] In any event, given the requirement that all applicants for the military must be fingerprinted, petitioner's fingerprints would have been inevitably discovered. Pet. App. 12a n.3; *id.* at 13a (Sullivan, J., concurring in the result).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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